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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1924

NO. 622

VINCENT L. KNEWELL, as Sheriff of Minnehaha County, South Dakota, Appellant,

vs.

GEORGE W. EGAN.

BRIEF FOR APPELLANT

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TABLE OF CASES

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STATEMENT OF THE CASE.

This is an appeal in a habeas corpus matter taken by Knewel, as Sheriff of Minnehaha County, South Dakota, from an Order of the United States District Court for the District of South Dakota, which Order discharged the appellee, Egan, from his custody as such officer.

Egan was charged by the State's Attorney of Minnehaha County, South Dakota, with the commission of a crime. He was tried in May, 1920, upon the charge in the Circuit Court of the State for that county, was found guilty by the jury, and was sentenced to serve a term in the state penitentiary. Egan appealed to the Supreme Court of the State, and by his appeal attacked the form of the information or charge, and assigned other errors by the trial Court. The Supreme Court vacated the judgment of the lower Court and granted a new trial. By its opinion the Supreme Court sustained the form of the information, but found errors in the record in the admission and rejection of evidence. For opinion, see 44 S. D. 273, 183 N. W. 652.

Note—In this Brief, the pages of the printed transcript of the record are referred to by the abbreviation R with the number of the page.

Egan was again brought to trial upon the same charge in April, 1922, was again found guilty by the jury, and was again sentenced by the Court to serve a term in the state penitentiary. He appealed to the Supreme Court of the State, and upon such appeal the judgment of the trial Court was affirmed, the decision being filed October 26, 1923. For opinion, see State vs. Egan, (S. D.) 195 N. W. 642.

Thereupon, the process of the trial Court was placed in the hands of the appellant, Knewel, as Sheriff of said Minnehaha County, for the execution of the sentence and judgment of the Court, and for the conveyance of Egan to the state penitentiary. On December 1, 1923, while in the custody of Knewel under such process Egan secured a writ of habeas corpus directed to Knewel from the United States District Court for the District of South Dakota. The hearing upon the writ was held before the Hon. Albert L. Reeves of Kansas City, Missouri, acting as Judge of the Court by assignment in place of Hon. J. D. Elliott, the regular Judge of said Court, and on April 2nd, 1924, the Order of such Court was filed and entered, discharging Egan from the custody of Knewel. To reverse such Order, this appeal was taken.

The statute upon which the prosecution in the State Court was based is Section 4271, Revised Code 1919, South Dakota, the relevant part as follows:

> "Every person who presents or causes to be presented any false or fraudulent claim, or any proof in support of any such claim, upon any contract of insurance for the payment of any loss, * * * is punishable by imprisonment in the state penitentiary not exceeding three years, or by a fine not exceeding $1000, or both."

The information or charge against Egan under such statute, so far as is pertinent, is as follows: (R. 2-4)

> "State of South Dakota, County of Minnehaha—ss.
>
> "In the Circuit Court Thereof, Second Judicial Circuit, May Term, A. D. 1920.

The State of South Dakota v. George W. Egan, Defendant. Information for the Crime of presenting False Claim and Proof of Loss.

"L. E. Waggoner, state's attorney of the county of Minnehaha, in the second judicial circuit of the state of South Dakota, upon his oath informs the court:

"That the Firemen's Insurance Company of Newark, New Jersey, was at all of the times herein mentioned a corporation * * * engaged in the business of insuring property against accidental loss by fire, * * * had fully complied with the laws of the state of South Dakota, * * * was authorized to do a fire insurance business in the state of South Dakota, * * * and * * * on the 6th day of September, 1919, issued to said George W. Egan its policy of insurance, * * * by the terms of which a two and one-half story frame building located on tracts four (4) and five (5) * * * of the northwest quarter (N. W.¼) of section thirty-two (32), township one hundred one (101), range forty-nine (49), Minnehaha county, South Dakota, was insured in the amount of twenty-five hundred dollars ($2,500), for the term of one year from and after September 6, 1919, and thereafter, * * * on or about November 24, 1919, the said property * * * was consumed and with the exception of the foundation completely destroyed by fire. * * *

"And that thereafter, and on or about the 9th day of January, 1920, the said defendant, George W. Egan, then and there did willfully, unlawfully, and feloniously present and cause to be presented to F. C. Whitehouse & Co., who were at that time acting as the agents for the Firemen's Insurance Company of Newark, New Jersey, a false and fraudulent claim and proof in support of such claim, a copy of which is hereto attached, marked Exhibit 'A' and made a part of this Complaint; * * * wherein and whereby the said defendant represented and claimed that said building * * * had been completely destroyed by fire on the 24th day of November, 1919; that the cause of said fire was unknown; that said

building was occupied as a residence and summer home; that the value of said building was $30,000. * * *

"Whereas, in truth and in fact, each and all of said statements in said proof of claim were false and known to be false and fraudulent by the said defendant at the time they were made, in this * * * The cause of the said fire was at the time known to the said George W. Egan, in that he had caused and procured said fire to be set and started for the purpose and with the intent of destroying said building, and the said George W. Egan had never occupied the said building as a home or summer residence, nor had the said building ever been occupied as a home or summer residence by anybody during the time when the said policy of insurance was in force; * * * and

"Whereas, in truth and in fact, the said building was not of the value of thirty thousand dollars ($30,000) * * * all of which said false and fraudulent claims and proof of loss were made with the intent upon the part of the said George W. Egan to present and use the same in support of the said George W. Egan's claims against the said Firemen's Insurance Company, and the said defendant did thereby and by said means commit the crime of presenting a false claim and proof of loss upon a contract of insurance, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of South Dakota."

Said Exhibit "A" (R 24-26) was a proof of loss upon a policy of insurance issued by the Firemen's Insurance Company of Newark, New Jersey, at its Sioux Falls Agency, insuring the defendant for $2,500.00 against loss by fire upon the building located on the property above described, and the same is shown to have been verified by the defendant at Sioux Falls, in Minnehaha County, South Dakota. (R. 26)

When arraigned for the first trial, Egan did not

demur to the information, but pleaded "not guilty." (R. 17, par. III, also R. 27). When the case was called for the second trial, Egan asked permission to withdraw his plea of "not guilty" for the purpose of interposing a demurrer to the information (R. 27). The request was denied; whereupon the petitioner orally objected "to the introduction of any testimony under the information in this case, because:

(1) The information does not substantially conform to the requirements of law as prescribed in Section 4771 of the Revised Code of 1919.

(3) That said information does not describe a public offense, that no venue is laid and that the court is without jurisdiction in this case under the information filed herein.

(4) That the information does not state facts sufficient to constitute a public offense under the laws of the State.

(5) That the county in which the alleged offense is alleged to have been committed is not stated in said information, and that said information is defective in failing to lay the venue in order to give the court jurisdiction in the premises." (R. 28, 29.)

The objection was overruled by the Court. The objection was renewed by Egan at the close of the State's evidence at the trial, together with the further objection that the State had failed to prove venue, and the objections were overruled. (R. 67, 68.) The same contentions were made to the trial court by Egan after conviction by motion in arrest of judgment (R. 92) and by motion for new trial, and were denied. The Supreme Court found against the same contentions upon his appeal to that Court.

In this habeas corpus proceeding, Egan contended that the State Court was without jurisdiction of the cause for which he was tried, and his conviction therein was a nullity; that therefore his restraint under the judgment of the Court was in violation of his

rights under Section 1, Art. XIV of the Amendments to the Federal Constitution. The grounds upon which lack of jurisdiction in the State Court was urged, were: (R. 8, see also, amended petition R. 11-15.)

1. The information did not show venue; did not set forth the name of the county in which the offense was alleged to have been committed.

2. There was no proof of venue.

3. Section 4271 of the 1919 South Dakota Code, which Egan was accused of having violated, had been superseded and repealed by a later law of the State.

4. The information did not state facts sufficient to constitute a crime because it did not state that the false proof of loss was presented upon a policy of insurance.

The issues in the habeas corpus matter were made up by the petition for the writ, (R. 1-9) and amended petition, (R. 11-16), and the return of the sheriff to the writ and petition, (R. 16-22), which return was not traversed except as to some conclusions of law. The return set out the judgment of the State Court in the criminal action against Egan providing for his imprisonment. There was an answer or reply to the return. (R. 22, 23). The evidence of Egan consisted of the printed abstract of the record or statement of the case which counsel for Egan had prepared and used upon the last appeal of his case to the Supreme Court of the State, (R. 24-98). The evidence in opposition consisted of the printed brief of counsel for the state used in the same appeal to the State Court, (R. 112, 113); an excerpt from the brief of counsel for Egan used upon the first appeal of his case, (R. 113, 114); and the testimony of three witnesses and two exhibits from the official transcript of the proceedings, (Bill of Exceptions) at the last trial in the State Court, (R. 114, 116). Except the portion thus described the transcript of the evidence or Bill of Exceptions containing the evidence produced at the trial

in the State Court was not brought before the District Court in the habeas corpus matter. At the hearing, Knewel as Sheriff was represented by, and there appeared in opposition to the discharge of Egan from custody, Buell F. Jones, Attorney General of South Dakota, and Byron S. Payne. (R. 110). The appeal was taken in the name of Knewel, as Sheriff, by Buell F. Jones, Attorney General, Hugh Gamble, State's Attorney of Minnehaha County, and Byron S. Payne, special counsel representing the State, and the expense of the prosecution of the appeal has been borne by the State. See affidavit in support of Motion to Intervene, Appendix page 65

The District Court declared in its opinion (R. 98-104) that it was its duty in habeas corpus to pursue its inquiry through the record of the proceedings and ascertain whether the requisite, jurisdictional facts existed for the State Court; citing Moore vs. Dempsey, 261 U. S. 86. It passed by unnoticed the fourth contention of Egan that the information was insufficient because it did not state that the false claim was presented upon a policy of insurance; stated that it was unnecessary to determine Egan's third contention, but in passing resolved this contention against him, viz: that Section 4271 had not been repealed; reviewed the South Dakota statutes and concluded that the form of the information was insufficient under the statutes to support a conviction, hence the conviction entirely void; reviewed the abstract or statement of the evidence produced before the trial court and concluded that the venue was not proved, and that this ousted the State Court of jurisdiction. Then followed the Order filed April 2nd, 1924, which discharged Egan from the custody of the Sheriff, and from which this appeal to this Court is taken. (R. 105, 106).

ASSIGNMENTS OF ERROR
(R. 106)

By the Assignments of Error which appellant has made a part of the record, appellant assigns as error

the making by the Court of said Order of April 2nd, 1924, in the following particulars and for the following reasons: (R. 106-108).

FIRST, Said Decision and Order is erroneous because Respondent was holding Petitioner in his custody under process in Respondent's hands as such Sheriff issued out of the Circuit Court of Minnehaha County, South Dakota, based upon a Judgment of Conviction against Petitioner for a criminal offense in said Circuit Court, and said Judgment was and is a valid and subsisting Judgment of said Court.

SECOND, Said Decision and Order of the Court is erroneous because it is based upon a finding and decision of this Court that the Judgment of Conviction described in the preceding assignment was void and a nullity upon the ground that the said Circuit Court of Minnehaha County, South Dakota, which gave such judgment of conviction was without jurisdiction of said cause; whereas the fact is that said Judgment of Conviction was given in a criminal cause brought against Petitioner in the Circuit Court of said County, and that said Court had jurisdiction of Petitioner and the subject matter of said action therein. That by said cause petitioner was duly prosecuted in said Court for a violation of a law of said state, and such law is not in itself repugnant to the constitution of the United States, and said prosecution was conducted according to the settled course of judicial procedure as established by the laws of the state of South Dakota, and said proceedings included due notice to the petitioner at all stages thereof and opportunity was offered the petitioner at all stages of the trial for a hearing on every question raised.

THIRD, Said Decision and Order of the District Court is erroneous because it is based upon a decision and finding of the Court that the information filed in the criminal cause in Minnehaha County described above was insufficient to sustain a judgment and, therefore, all proceedings tending to said Judgment of

Conviction were void; whereas the only defect shown in said information was that same did not affirmatively show the jurisdiction of said state court to proceed in said cause. Said defect in said information did not deprive said Court of jurisdiction in said cause for the following reasons:

(a) An information must clearly show upon its face that the Court is without jurisdiction of the subject matter in order to deprive the Court of jurisdiction to try the cause. That is not true of the information under consideration; at most it fails to affirmatively show that the alleged offense was committed within the jurisdiction of the court.

(b) South Dakota has a statute (Section 4779, South Dakota Revised Code of 1919) which provides in effect that a defendant in a criminal cause shall make the objection to an information that it does not affirmatively show the jurisdiction of the court by filing a written demurrer to such information, and if objection is not taken in this manner, same shall be deemed waived; and it appears from the record in this cause that Petitioner in the said criminal cause in which he was defendant did not file a written demurrer to said information.

(c) Said information under consideration was before the Supreme Court of the State of South Dakota, which is the Court of last resort in said state, and said Court found and determined that the place of the commission of the alleged offense was not an element of the offense; that the information in question did not show upon its face that offense was committed without the jurisdiction of the Court; that it merely failed to show affirmatively that the offense was committed within the jurisdiction of the Court; that the statute above described was applicable thereto; but this Court in making its said Decision and Order in this case has construed said statute as not applicable to said information, and has given a construction of said statute at variance with the highest Court of the State.

FOURTH, Said Decision and Order of the District Court is erroneous because it is based upon the finding and decision of the Court that it had authority and jurisdiction to review the evidence at the trial of said criminal cause in the state court, and to make a finding that no evidence was presented that the alleged offense was committed within Minnehaha County, South Dakota, and did make such finding. Such finding and decision is erroneous because no authority resides in this Court to review the evidence and make a finding at variance with the decision and record of the state court; and further because said finding is contrary to the record of the evidence presented, and evidence was presented at such trial in that state court to the effect that the offense charged was committed within the jurisdiction of the court.

FIFTH, Said Decision and Order of the District Court is erroneous because it is based upon a finding and conclusion that the prosecution in the trial of said cause in the state court failed to present evidence that the alleged offense was committed in Minnehaha County, South Dakota, and this failure ousted the said Court of jurisdiction of said cause, and that the Judgment of Conviction therein would be held void on this account, for the reason that the jurisdiction of the Court depends upon the authority given by law to the court to try and determine an alleged offense, and not upon its correct determination.

SIXTH, Said Decision and Order of the District Court is erroneous in granting relief to Petitioner by Habeas Corpus for the reason that no exceptional circumstances exist in this cause which justify or require the Federal District Court to interfere by Habeas Corpus with the judgment and process of the state court.

SEVENTH, Said Decision and Order of the Federal District Court is erroneous because it is based upon the findings of said Court that defects and irregularities existed in the proceedings and process of a

state court and such claimed defects and irregularities are not jurisdictional defects, and said decision and order of this court permits the petitioner to use the writ of Habeas Corpus as a substitute for a writ of error to review alleged errors of the state court in the exercise of its jurisdiction in a criminal cause.

EIGHTH, Said decision and order of the District Court is erroneous because it is based upon the finding and conclusion of the Court that petitioner was being held in custody by respondent in violation of the rights of petitioner under the 14th amendment to the Constitution of the United States, and said finding and conclusion of the Court is erroneous for all the reasons stated and set forth in the foregoing errors assigned.

NINTH, The Court erred in making its said Decision and Order discharging the Petitioner from the custody of the Respondent for all of the reasons stated and set forth in the foregoing errors assigned.

STATEMENT OF POINTS

I.

In a habeas corpus proceeding to determine the cause of restraint under a judgment of a state court, to justify release, such judgment must be shown to be absolutely void for want of jurisdiction in the court that pronounced it.

II.

An information, such as we have here, which does not clearly show that the alleged offense was committed without the jurisdiction of the Court, but which fails to state where the alleged offense was committed and that it was committed within the jurisdiction of the Court, is not a void paper, and the act of a competent Court of general jurisdiction in passing thereon is not a void act, and a conviction based thereupon is not a nullity.

III.

Habeas corpus cannot be used to test the suf-

ficiency of such an information, nor to review a claimed erroneous ruling of the Court thereon; for to do so would be to utilize the writ for the purpose of proceedings in error. This is an ordinary habeas corpus case, and no "exceptional circumstances" exist to take it out of the general rule.

IV.

Egan had due process of law by his conviction under such information. The South Dakota statute provides that an information in the form here found may be used when as here the accused fails to demur thereto, and such statute forms a part of the usual and settled course of judicial procedure as established by the laws of the State, and same is not repugnant to the Federal Constitution.

V.

The State Court in which Egan was convicted was given power by law to try and determine the charge against Egan, and was a Court of general jurisdiction. The federal district court could not by habeas corpus review the evidence presented to the trial court, and thereby impeach collaterally the conclusion and record of the State Court with reference to the effect of such evidence.

VI.

Construction of the state statutes involved have been concluded by the decision of the highest Court of the State.

VII.

Discussion of Motion to Substitute successor of Knewell as Sheriff, and Motion of State to Intervene.

ARGUMENTS AND AUTHORITIES

PROPOSITION I.

It is established by a long line of decisions of the United States Supreme Court that in a habeas corpus proceeding to determine the cause of restraint under a judgment of a State Court, to justify release, such judgment must be shown to be absolutely void for

want of jurisdiction in the Court that pronounced it. The habeas corpus inquiry reaches alone to the question of jurisdiction. Andrews vs. Swartz, Sheriff, 156 U. S. 272; Bergemann vs. Backer, 157 U. S. 655; Ex Parte Lennon, 166 U. S. 548; Felts vs. Murphy, 201 U. S. 123; Valentina vs. Mercer, 201 U. S. 131; Frank vs. Mangum, 237 U. S. 309.

PROPOSITION II.

Appellant contends, secondly, that the information filed against Egan in the state court was not a void paper; that the act of the state court in receiving such information and in trying Egan thereon, and the conviction of Egan based thereon, were not idle and void acts. The Court was not entirely without jurisdiction to proceed in such matter.

The attack against the form of the information made by Egan in his petition for the writ of habeas corpus is that same did not allege that Egan had committed a crime within the territory limits and jurisdiction of the Court in which it was filed, and because of this the same was void and a nullity, and the Court did not have jurisdiction to proceed (R. page 8). That was the only defect in the form of the information claimed by Egan throughout the proceedings in the state court. The return of the Sheriff to the writ, (R. 16) shows the course of the proceedings in the state court through two trials in the circuit court and through two appeals to the Supreme Court of the state, and the facts stated were not traversed. Throughout, the objection was that the information did not allege venue. For a first time in an amended petition for the writ of habeas corpus, Egan's counsel suggested that the information might be construed to charge that the crime was committed at Newark, New Jersey. (R. 14). This suggesion is based upon the descriptive words "of Newark, New Jersey" in the information wherein it is charged that the false proof of loss was presented to F. C. Whitehouse and Company, who were at that time acting as agents for the

Firemen's Insurance Company of Newark, New Jersey. The reference to Newark, New Jersey, in the information is merely descriptio personae as pointed out in the case of State vs. Mahoney, 98 Atl. 750 (Me.); see State vs. Jackson, 39 Me. 291. A construction so fanciful and strained that it was not thought of by Egan or his counsel throughout the long period of the litigation in the state court and at the time of his filing his petition for the writ or error, but was suggested for the first time in an amended petition, surely ought not to require much consideration from this Court in its collateral inquiry into the record. If it were not for the use of the descriptive words "of Newark, New Jersey" in connection with the name of the insurance company, the information doubtless would be held sufficient, under the theory of the Supreme Court of Wisconsin in State vs. S. A. L., 46 N. W. 498. There the Court held that the words "then and there" referred to the county in the caption. There is weight to the argument of the Maine court in State vs. Mahoney, supra, that "then and there" must refer to a time and place co-existent. In the information under consideration "then" plainly refers to January 9, 1920, and the only act shown by the information to be co-existent with this time was the making and verification of the proof of loss at Sioux Falls in Minnehaha County, S. D. The defendant was informed in express terms by the information that the State's Attorney of Minnehaha County, South Dakota, was charging him with an offense against the statutes and peace and dignity of the State of South Dakota. There is enough in the information so that it might reasonably be claimed that the information informed the accused that the alleged criminal act was committed within Minnehaha County. Certainly the accused was not informed, nor did he understand, from the information, that he was charged with a criminal act performed outside of the State of South Dakota.

We think then it is clear that the most that can be claimed against the information, is that it did not

clearly set forth the place where the criminal act was performed, and fix it within the jurisdiction of the Court. The question then is, was the State Circuit Court without jurisdiction to proceed against Egan upon such information?

The Circuit Court of South Dakota is a Court of general criminal jurisdiction. See Section 14, Art. 5, S. D. Constitution and Sections 4653, 4654, 4655, and 3573, S. D. Rev. Code, 1919, (Appendix pages 59). It will be seen from the above sections of the statute that the territorial jurisdiction of the Circuit Court is not limited to a county. It extends as far as the statute law extends in its application, namely, throughout the limits of the state. The only limitation contained in the statute is found in Sec. 4654 which provides that issues of fact in any criminal case must be tried in the county in which the same is brought, or to which the place of trial is changed by order of court.

This general jurisdiction of the Circuit Court is not limited by the provisions of the State Constitution and statutes which confer personal righs on a person accused of crime. These are Secs. 6 and 7, Art. 6, South Dakota Constitution, and Sec. 4410 S. D. Code, (Appendix page 64).

Section 4813 of the South Dakota Revised Code (Appendix 64) provides for a change of the place of trial on the application of the defendant to a county other than in which the action is brought and the crime alleged to have been committed. The accused may waive the personal rights guaranteed him by the above provisions of the constitution and statute law including the right as to place of trial. State vs. Ross, (S. D.) 197 N. W. 234, and cases therein cited. The defendant consenting or waiving his right as to place of trial, the Circuit Court has jurisdiction to try and determine any case of felony, no matter in what county of the State committed.

In South Dakota a criminal action is commenced by the filing of an information. Sec. 4655 S. D. Code (Appendix page 60). By Sec. 4715 of the S. D.

Code (Appendix page 62) all technical forms of pleading in criminal actions are abolished, and it is necessary only to plead the commission of the offense by its usual designated name in plain ordinary language. Sec. 4725 (Appendix page 62) enumerates the essential statements of an information, among which is "4. That the offense charge was committed within the jurisdiction of the Court." Sec. 4771 (Appendix page 64) provides that the defendant may demur to the information when it appears upon the face thereof "1. * * * that the Court is without jurisdiction of the offense charged" and "2. That it does not substantially conform to the requirements of this title," which title includes Sec. 4725 referred to above, and therefore includes the requirement that the information shall show that the offense charged was committed within the jurisdiction of the Court.

Sec. 4779 of the South Dakota Code (Appendix page 64) provides that when the objections for which demurrer may be interposed under said Sec. 4771 appear on the face of the information, they can only be taken by demurrer, except the objection that the information shows on its face that the Court has not jurisdiction over the subject of the information, and the objection that it does not describe a public offense. Other objections are waived. The objection as to the form of the information, that it does not affirmatively allege venue, as required by the Code Sec. 4725 is therefore waived. In other words, these statutes designate two distinct classes of defective informations. One class is where the information shows upon its face that the crime was committed without the jurisdiction of the Court, and therefore shows on its face that the Court did not have jurisdiction. The second class is where the information simply fails to state that the offense was committed within the jurisdiction of the Court. This latter defect goes simply to the form of the information, not to the question of the actual jurisdiction of the Court.

So far as the form of the information is concerned, and so far as the right of the Court to proceed upon the information is concerned, the accused waives the latter defect by failing to demur thereto. The assertion of jurisdiction is supplied by the bringing of the action and the title thereof.

The information under consideration was before the Supreme Court of South Dakota in the first appeal in the prosecution in the State Court, State vs Egan 44 S. D. 273, 183 N. W. 652, The late Justice Whiting of that Court in the opinion very clearly pointed out the distinction between the two classes of defective information, and the effect thereof, wherein he said:

> "It follows, therefore, that, even though there was no demurrer interposed to the information, yet if it appears on the face of such information that the same does not state facts sufficient to constitute a criminal offense, or if it appears on the face of such information that the trial court did not have jurisdiction over the subject of the information, there was reversible error in the rulings of the Court. The sole basis of appellant's contention is the failure of the information to specifically set forth the venue of the alleged offense. No claim is made but that, if the venue had been clearly stated, the information would have stated facts sufficient to constitute a public offense. Inasmuch as the place of the alleged offense in no manner constituted an element of such offense. it is apparent that there is no merit whatsoever to the claim that the information did not state facts constituting a public offense. If the information had expressly placed the venue of the offense in some county other than that where the information was filed, it would have then 'appeared on the face of the information' that the trial court did not have jurisdiction of the cause. But there is a wide distinction between an information which shows on its face that a court has not jurisdiction of the particular cause, and

an information which fails to show that the court has jurisdiction of such cause—it does not appear on the face of this information that the trial court did not have jurisdiction. Except where the place of an alleged offense is a material element of the offense, an information setting forth such offense can, because of an ommission to allege the place thereof, be attacked by demurrer only; and so attacked because it did not conform to the requirement of Section 4725, R. C. 1919, that an information should disclose, 'that the offense charged was committed within the jurisdiction of the court, or though without the jurisdiction of the court, is triable in that particular court'."

The views of Justice Whiting in respect to this matter were approved by the South Dakota Supreme Court in the second appeal of Egan's case. State vs Egan 195 N. W. 642. It will be seen from the opinion of Justice Whiting that, under the South Dakota practice and statutes, "Except when the place of an alleged offense is a material element of the offense, an information setting forth such offense can, because of an ommission to allege the place thereof, be attacked only by demurrer." In spite of the opinion of the South Dakota Court, we find Judge Reeves saying in his opinion below with respect to the construction to be given said statutes, "Nor are conclusions of the Supreme Court in this regard sustained." Manifestly this is a wrong view and the construction to be placed upon the South Dakota practice statutes are concluded by the decision of the South Dakota Supreme Court. In re Duncan 139 U. S. 449, 35 L. Ed. 219.

The requisites of a demurrer are prescribed by statute. See Section 4772, Appendix page 61. It must be in writing and filed. It is a dilatory plea and hence must be made before a plea to the merits. When brought to trial in 1920, Egan chose to plead "not guilty," instead of challenging the form of the in-

formation. The excerpt from the record of the first trial of Egan (R page 114, paragraph third) shows that this course was deliberate. When brought to trial two years later, a second time, he appealed to the discretion of the court to be allowed to withdraw his plea of "not guilty," for the purpose of demurring. The trial court in the exercise of its discretion was of the view that at that late stage in the prosecution, and after Egan had speculated upon the result of one trial under his plea to the merits, he ought not to be allowed to do this, and his request was denied. The fact was that he had failed to demur, and his rights were fixed under the statutes. Any error in the ruling of the court upon this discretionary matter, even assuming there was an abuse of discretion, cannot be made the basis of an attack upon the jurisdiction of the Court.

It should be borne in mind that the question to be considered in only as to the form of the information, and the right of the Court to proceed thereon. The only jurisdictional question involved is whether the Court had the right to entertain the information and try the accused thereon. We have here an information, the use of which is authorized under certain circumstances by the statutes of South Dakota. The information is not a void and useless paper if it may be used when the prescribed circumstances exist. We have this information presented to a court of general jurisdiction. which in the exercise of its jurisdiction found that the circumstances that make proper the use of an information in such form existed in Egan's case. Having been vested with authority to inquire into the sufficiency of the information, a determination by the court even though erroneous, is not a void act, but only subject to correction in proceedings to review its determination. We assert with confidence, therefore, that this information is not a nullity and the conviction of Egan based thereon not void.

PROPOSITION III.

Habeas Corpus Cannot Be Used To Test Sufficiency of Information

It is a general rule established by the authorities that Habeas Corpus cannot be used to test the sufficiency of an indictment or information. This is done by demurrer, motion to quash, arrest of judgment, and like procedure. If the sufficiency of the pleading could be reviewed in Habeas Corpus proceedings, it would make the writ perform the function of a writ of error or review. For this reason, the authorities have established the rule that where the pleader in an information has attempted to state an offense known to the law, such information will not be regarded as void, and the action of the court thereon as void. Where there is an information sufficient to invoke the judicial discretion of the court in dealing with it, even though defective in essential particulars, it is not a void information, nor is the action of the court thereon void.

Leonard vs State 93 So. 56, 18 Ala. App. 427.

Strickland vs. Thompson 116 S. E. 593, 135 Ga. 125.

Ex Parte Kaster 198 Pa. 1029, 52 Cal. App. 454.

Ex Parte Robinson, 75 So. 604, L. R. A. 1918 B. 1148.

Tullis v. Shaw 83 N. E. 376, 169 Ind. 662.

Bopp vs. Clark 147 N. W. 172, 165 Ia. 697.

State vs. Riley 133 N. W. 86, 116 Minn. 1.

Ex Parte Grubbs 30 So. 708, 79 Miss. 358.

Ex Parte Siegel 263 Mo. 375, 173 S. W. 1.

Guginon vs. State 163 N. W. 858, 101 Neb. 587.

People vs. Knott 176 N. Y. S. 321, 335.

People ex rel Friedman vs. Hayes 158 N. Y. S. 949.

Application of Moriarty 191 Pa., 360, 44 Nev. 164.

Ex Parte Hill 156 Pa. 686, 12 Okla. Crim. 335.

Ex Parte McKay 199 S. W. 637, 641, 82 Tex. Crim. 221.

Ex Parte Turner 102 Atl. 943, 946, 92 Vt. 210. 210.

In Ex Parte Kaster, 198 Pa. 1029 (Cal.) supra, it is stated, "If the facts alleged squint at a substantive statement of the offense, no matter how defectively or inartifically they may be stated, or however confused and beclouded they may be rendered through intermingling them with immaterial or unnecessary averments, the writ will not lie." In Ex Parte Robinson, supra, it is stated, "The true rule seems to be that it is only where the facts stated in the indictment are not and cannot be so stated as to charge an offense that the prisoner may be discharged, and where the matters are of such character that the indictment, though defective for lack of a statement of an essential ingredient of the offense, may be perfected into a sufficint accusation of crime, the prisoner should be held to abide the judgment or order of the court." In Leonard vs. State, the indictment did not show venue, but the court said:

"The demurrers to defendant's plea as to the jurisdiction of the court to try this case were properly sustained, as it is not necessary to allege specifically in an indictment where the offense complained of was committed; but it must be proven upon the trial of the case to have been committed within the jurisdiction of the court in which the indictment is preferred."

In the Iowa case, Bopp vs. Clark, supra, the court held that jurisdiction was not lost through a defective information. In this case the court said:

"It is further urged by the appellant that the information failed to charge any offense in that it stated no sufficient facts, but stated legal conclusions only. If the information is not sufficiently specific, it is amendable. Proceedings are not thereby rendered void by reason of its insufficiency. If they were,

they could not be saved by amendment. The jurisdiction of the criminal court over the defendant after his arrest is not lost by mere defect in information or indictment. This is illustrated by the provisions of our statute which authorize the district court to hold a defendant pending the return of a second indictment, where the prosecution against him has failed for insufficiency of a prior indictment."

The statutes of South Dakota are much the same as the Iowa statutes in the respect noted in the above case. When an objection to the sufficiency of an information is made by motion to quash, demurrer, or motion in arrest of judgment, the court is required to determine whether the defect may be remedied and if so to hold the defendant and order an amendment of the pleading by the filing of a new information. See Sections South Dakota Code, (Appendix pages 263). If the court does not order the filing of a new information, a prosecution of the offense is forever barred. It would be a strange situation that the inadvertent ommission to state the county in which the offense was committed would result in preventing the court from ordering the filing of a new information, and thus barring a prosecution of the accused. Yet if the court has jurisdiction to do this, the filing of the information and the action of the court thereon is not a void thing and subsequently proceedings of the court upon such information are not entirely void.

The case of Guignon vs. State (Neb.) 163 N. W. 858, is an instructive case on this proposition. Two defendants were informed against for aiding and abetting a felony. While the felony was alleged to have been committed in a designated county, there was no allegation that the acts of the defendants in aiding and abetting the commission of that felony were had in that or in any other county. The pleading was silent as to where their acts were committed. The court says, "If the defendant made no objection to the form of information and pleaded not guilty,

he cannot wait until he sees whether he is acquitted before he makes the objection which he here seeks to make. Because he failed to object, he waived the objection which he might perhaps have made at the proper time. While the information does not affirmatively show that the robbery was committed in Hall county, no objection was made until after the trial. It comes too late at this time."

If an information is void which does not state venue, the defendant cannot waive the defect, The principle of waiver announced by the Nebraska court necessarily implies that the information was only voidable. If the information without venue went to the jurisdiction of the court, the defendant could not waive the defect.

A uniform line of Federal decisions are to the effect that the sufficiency of an indictment cannot be reviewed in Habeas Corpus proceedings.

Ex Parte Parks 93 U. S. 18, 23.
In re Coy 127 U. S. 731, 758, 759.
Caldwell vs. Texas 137 U. S. 692.
United States vs. Pridgeon 153 U. S. 48.
Bergman vs. Backer 157 U. S. 655.
Kohl vs. Tehlback 160 U. S. 293.
Howard vs. Flemming 191 U. S. 126.
Dimmick vs. Thompson 194 U. S. 540, 552.
Barrington vs. Missouri 205 U. S. 483, 487.
Matter of Gregory 219 U. S. 210.
Ormsby vs. U. S. 273 Fed. 977.
Moust vs. Warden 283 Fed. 912.

In Bergman vs. Backer, supra, it was said:

"If an indictment in a state court, under statutes not void under the constitution of the United States, be defective according to the essential principles of criminal procedure, an error in rendering judgment upon it, even if the accused at the trial objected to it as insufficient, will not be made the basis of jurisdiction in a court of the United States to issue a writ of habeas corpus."

It was held in United States vs. Pridgeon, 153 U. S. 48, 59, that an indictment which does not show affirmatively that the offense which it purports to charge was committed without the jurisdiction of the trial court will sustain a conviction as against collateral attack by way of habeas corpus even though on demurerr or writ of error it might be found defective in not alleging the place where the offense was committed. The opinion states, "But, whether this be so or not, it is very clear that there is nothing on the face of the indictment to show affirmatively that the district court for the First Judicial District, within and for Logan county, Oklahoma territory, and for the Indian country attached thereto for judicial purposes, sitting with the powers of a district court of the United States, did not have jurisdiction of the offense for which Pridegon was convicted, so as to render its sentence void on collateral attack. If the indictment does not fairly and sufficiently aver that the offense in question was committed in the Cherokee Outlet, it certainly does not show affirmatively upon its face that it was committed elsewhere, and without the jurisdiction of the court. It may be, that upon demurrer or writ of erorr, the indictment might have been found defective in not alleging with greater certainty the particular locality in which the offense was committed, within the rule laid down in McBride vs. State, 10 Humph. 615, but it cannot be properly held that the indictment is so fatally defective on its face as to be open to collateral attack after trial and conviction, or that the sentence of the court pronounced thereon was void. The habeas corpus proceedings being a collateral attack of a civil nature, it must clearly and affirmatively appeal that the indictment charged an offense of which the court had no jurisdiction, so that its sentence was void. This does not appear in the present case, and the second question certified must, therefore be answered in the negative."

The United States Supreme Court has thus in

the above case laid down the rule by which it may be determined when venue in an information is jurisdictional. If the information clearly places the commisison of the offense outside the jurisdiction of the court, so that it affirmatively appears that the court has not jurisdiction, the information is void, and proceedings of the court thereunder are void. If the information simply fails to show the jurisdiction of the court, same is not void, the court's action thereon is not void, and it is not a jurisdictional defect. The rule thus announced ought to effectually dispose of petitioner's contention as to the defect in the information in his case. Failure to allege venue is not jurisdictional.

Neither the sufficiency of the information, nor whether it shows on its face that a crime is not charged, can be reviewed on habeas corpus. Ormsby vs. U. S., 273 Fed. 977.

In Moust vs. Warden, 283 Fed. 912, a decision of the Circuit Court of Appeals of the Eighth Circuit, it was held that a defect in an indictment for murder that would have shown jurisdiction only by alleging that the murdered man was an Indian, but in fact was silent as to his nationality, could not be reached by habeas corpus after conviction. The court said: "It may be conceded that an indictment charging such an offense against a white man might be successfully challenged in limine, if it did not appear that the one murdered was an Indian; but if it be not so charged and the indictment be not challenged, and it appear on the trial that the person murdered was an Indian, the United States court sitting within a state would have jurisdiction of the offense. It does not appear from this indictment that Batemen was not an Indian. But in either event, the question whether the trial court had or did not have jurisdiction on that account was one for its inquiry and determination. It had authority to hear and pass upon that question of fact, and its decision could have been reviewed by writ of error, but it cannot be attacked

collaterally. Toy Toy vs. Hopkins, 212 U. S. 542, 29, Sup. Ct. 416, 53 L. Ed. 644."

In Goto vs. Lane, 265 U. S. 393, 402 the indictment was attacked as insufficient. Mr. Justice Van Devanter, speaking for the Court said:

> "The construction to be put on the indictment, its sufficiency, and the effect to be given to the stipulation, were all matters the determination of which rested primarily with that court. If it erred in determining them, its judgment was not, for that reason, void (Ex parte Watkins, 3 Pet. 193, 203, 7 L. ed. 650, 653; Ex parte Parks, 93 U. S. 18, 20, 23 L. ed 787, 788; Ex parte Yarbrough, 110 U. S. 651, 654, 28 L. ed. 274, 275, 4 Sup. Ct. Rep. 152), but subject to correction in regular course on writ of error. If the questions presented involved the application of constitutional principles, that alone did not alter the rule. Markuson v. Boucher, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76. And if the petitioners permitted the time within which a review on writ of error might be obtained to elapse, and thereby lost the opportunity for such a review, that gave no right to resort to habeas corpus as a substitute. Riddle v. Dyche, 262 U. S. 333, 67 L. ed. 1009, Craig v. Hecht, 263 U. S. 255, 68 L. ed. 293, 44 Sup. Ct. Rep. 103."

The principle of the foregoing authorities is that a court of competent general jurisdiction is invested with authority to determine the questions of law and fact upon which its jurisdiction depends. The case of Toy Toy vs. Hopkins referred to in Moust vs. Warden, supra, involved an Indian who had been convicted of murder in the Federal Circuit Court for the District of Oregon, and sentenced to life imprisonment. The jurisdiction of the Federal Court depended upon its finding that the crime had been committed within Indian territory. Five years after conviction he sought release by habeas corpus claiming that it could be shown that the place of the crime, though

within an Indian Reservation was upon land that had been conveyed by the United States by patent in fee, and hence was not "Indian Territory" of which the United States Court had jurisdiction. The United States Supreme Court sustained the Federal Circuit Court in denying the application for the writ, saying:

> "If such were the facts, and they made out a want of jurisdiction under the applicable statutes, which, on the merits, we do not hold, the circuit court, nevertheless, was authorized to hear and pass upon those questions in the first instance, and its decision was open to review in the appellate court by writ of error. But it could not be attacked collaterally as absolutely void, and habeas corpus cannot be availed of as a writ of error. It is rarely that things are wholly void and without force and effect as to all persons and for all purposes, and incapable of being made otherwise. * * * In many cases jurisdiction may depend on the ascertainment of facts involving the merits; and in that sense the court exercises jurisdiction in disposing of the preliminary inquiry, although the result may be that it finds that it cannot go farther. And where, in a case like that before us, the court erroneously retains jurisdiction to adjudicate the merits, its action can be corrected on review."

This principle was emphasized in the very recent case of Rodman vs. Pothier 264 U. S. 399, 402, 68 Law Ed. 759, where this Court said:

> "Barring certain exceptional cases (unlike the present one), this court 'has uniformly held that the hearing on habeas corpus is not in the nature of a writ of error, nor is it intended as a substitute for the functions of the trial court. Manifestly, this is true as to disputed questions of fact, and it is equally so as to disputed matters of law, whether they relate to the sufficiency of the indictment of the validity of the statute on which the charge is based. These and all other controverted matters of

law and fact are for the determination of the trial court.' Henry v. Henkel, 235 U. S. 219, 229, Louie v. United States, 254 U. S. 548."

In United States vs. Valante, 264 U. S. 563, 68 L. ed. 850, Valante contended that his right of trial by jury guaranteed him by the federal constitution had been violated because in the prosecution of him for a crime, the verdict of the jury had been received by a judge other than the one who had presided at the trial. This Court reversed the District Court, saying:

"Without intimating that there is anything of substance in this contention, it is clear that the error, if any was committed, did not go to the jurisdiction of the court, or render the judgment void, but was, at the most, one which could have been corrected on a review by a writ of error. It is 'the well-established general rule that a writ of habeas corpus cannot be utilized for the purpose of proceedings in error.' Craig v. Hecht, 263 U. S. 255, 277, and cases there cited. And see Riddle v. Dyche, 262 U. S. 333, 335. There are no circumstances in the present case sufficiently extraordinary to bring it within any class of 'exceptional cases,' or make 'the general rules of procedure' inapplicable. Craig v. Hecht, supra, p. 277."

Judge Reeves appears to have relied almost wholly for authority to sustain his action upon the cases Ex Parte Van Moore, 221 Fed. 968, and Yohyowan vs. Luce 291 Fed. 425. Each was a case where the petitioner was imprisoned under a judgment of a state court, but the conceded facts showed that the state court was wholly without authority or jurisdiction to act, and its judgment void. In each "exceptional circumstances" were found which justified action by habeas corpus rather than writ of error. In the Van Moore case petitioner had been imprisoned for nearly fifteen years under the accepted view of the law by the state court, which view in a recent

case had been found to be erroneous by the Supreme Court of the United States. In the latter case, petitioner was an Indian and a ward of the Government, without means to pursue his remedy by writ of error. In the instant case, no facts, either conceded or controverted, are shown which make the judgment of the state court void, or indicate that the state court had not jurisdiction both of the cause of action and the person of Egan. The claim alone is that there was a defective statement of the cause of action. No claim is made that the defective information could not have been perfected into a sufficient accusation, nor that the alleged criminal act was not actually performed within the jurisdiction of the Court.

This is an ordinary habeas corpus case without "exceptional circumstances." While Egan yet had his right to a review by writ of error, he chose to proceed by habeas corpus, and to attempt to make a habeas corpus proceeding serve the function of a writ. That now it is too late to avail himself of the proper remedy is not a consideration why this court should relieve him from the situation in which he has voluntarily placed himself. Craig vs. Hecht, supra.

Counsel for petitioner cited to the District Court a large number of cases, the opinions in which were to the effect that an allegation of place or venue is jurisdictional. Most of these cases were decided upon a review by writ of error or appeal. They were not habeas corpus cases, where the question is,—Was the pleading and the action of the Court thereunder absolutely void. It should be borne in mind also that the jurisdiction of a particular court depends upon the law creating and giving that court authority. Doubtless in some states the statutes are to the effect that a court can proceed against a person accused of crime only upon an accusation which sets forth the venue of the offense within the jurisdiction of the court. The statute stands as an absolute bar to the court proceeding further unless there is such a plead-

ing. A statute of this nature would affect and limit the jurisdiction of the court. We have reviewed the South Dakota statutes, and find that they authorize the use of an information which does not allege venue, when the accused does not demur thereto.

In this connection the opinion of the court in the great case of Frank vs. Mangum, 237 U. S. 309 is exceedingly instructive. While the opinion of the court upon the question of the effect of mob domination of the trial court was modified in the recent case of Moore vs. Dempsey, the views of the court upon the other questions in the case have never been challenged. There was involved in the case of Frank vs. Mangum the effect of the absence of the accused upon receipt of the verdict of the jury and the polling of the jury. It was contended that the court lost jurisdiction because of the absence of the accused during a portion of the trial. It was conceded that under the laws of Georgia the accused had the right to be present at all stages of the trial. The Georgia court held that because the accused knew that the verdict was received in his absence and made a motion for a new trial before the trial court without including that as one of the grounds for a new trial, he could not later attack the judgment of the court as void; that he had waived his right by failing to make objection at the proper time. The Supreme Court of the United States approved this as a reasonable regulation of procedure. Id. 340. The opinion points out the difference between a statute which confers personal rights that may be waived, and a statute like that involved in Hopt vs. Utah, 110 U. S. 574, where there was a "violation of the plain mandate of the local statute" that prescribed the power of the court to proceed. Id. 340, 341. The opinion also points out that a court has not lost jurisdiction, when it still has the power and authority under the statute to proceed against the accused. Id. 339. This is the doctrine in the Iowa case, Bopp vs. Clark 165 Ia. 697, referred to in this brief.

PROPOSITION IV.

Egan Was Accorded Due Process of Law

By his fourth proposition appellant asserts that Egan in his conviction by the South Dakota Court under the information in question, not only was convicted by a court having jurisdiction, but was accorded that due process of law which is guaranteed him by the Fourteenth Amendment to the Constitution of the United States. The South Dakota statutes provide that an information shall show that the offense was within the jurisdiction of the Court; that the accused may demur to same if it does not; that if he fails to demur he waives this requirement and the Court may proceed to trial and judgment thereon. In other words, the statutes say that in such a case there is a sufficient assertion of the jurisdiction of the court from the bringing of the action entitled as to court and county. Does this procedure deny to an accused due process of law?

The Supreme Court of the United States has declared in numerous decisions that the essentials to constitute due process of law in a criminal prosecution are that there shall be a court created by the law and authorized by the law to act, and that there shall be notice and opportunity to hear given the parties.

Justice Moody in the case of Twining v. N. J., 211 U. S. 78, said:

> "We need notice now only those cases which deal with the principles which must be observed in the trial of criminal and civil causes. Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, Pennoyer v. Neff, 95 U. S. 714, 733; Scott v. McNeal, 154 U. S. 34; Old Wayne Life Association v. McDonough, 204 U. S. 8; and that there shall be notice and opportunity for hearing given the parties, Hoven v. Elliott, 167 U. S. 409; Roller v. Holly, 176 U. S. 398; and see Londoner v. Denver,

210 U. S. 373. Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law."

In Garland v. Washington, 232 U. S. 642, the court says:

"When the essential elements of a court having jurisdiction in which an opportunity for a hearing offered are presented, the power of the state under its methods of procedure is substantially unrestricted by the due process clause of the constitution. Due process of law, this court has held, does not require the state to adopt any particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution. Roger v. Peck, 199 U. S. 425, 435, and previous cases in this court there cited."

In Jordan v. Mass., 225 U. S. 167, Justice Lurton speaking for the court said:

"That the procedure in this was in conformity with the constitution and law of Massachusetts is determined by the judgment and opinion of the Supreme Judicial Court. Subject to the requirements of due process of law, the states are under no restriction as to the method of procedure in the administration of public justice. That the court had jurisdiction and that there was a full hearing upon the issue made by the suggestion of the insanity of the juror is not questioned. 'Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law, * * this court has, up to this time, sustained all state laws, statutory or judicially declared, regulating procedure, evidence, and methods of trial, and held them to be consistent with due process of law'."

In Louisville & Nashville Ry. Co. v. Schmidt, 177 U. S. 230, 236, we find:

> "It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend."

Here are some of the matters the Supreme Court has said are not essential to constitute due process of law. In Hurtado v. California, 110 U. S. 516, the right of a state by statute to abolish the grand jury and substitute prosecution by information was sustained. In Hallinger v. Davis, 146 U. S. 314, a statute was upheld permitting the grade of an offense to be tried by the court when jury trial was waived by the accused.

In Allen v. Ga., 166 U. S. 138, the action of the Supreme Court of the state in dismissing of writ of error in a criminal case as a penalty for the accused having become a fugitive from justice, was sustained. In Brown v. N. J., 175 U. S. 172, a statute providing for trial of a criminal case by a struck jury was sustained. In Maxwell v. Dow, 176 U. S. 581, a statute providing for a jury of eight persons was sustained. In Simon v. Craft, 182 U. S. 427, a statute of Alabama was upheld which provided that a person alleged to be of unsound mind might be excluded from being present at the trial of the question of her sanity. In Howard v. Kentucky, 200 U. S. 164, the state court was upheld in sustaining a conviction where the accused had been occasionally absent during the trial. In Feltz v. Murphy, 201 U. S. 123, 129, the conviction of a deaf person of the crime of murder who did not hear a word of the proceedings, and was not apprised of what occured, was upheld. In Twining v. N.

Jersey, 211 U. S. 78, it was held that the state by legislation might remove the exemption from self incrimination ordinarily conferred upon an accused and that such legislation does not violate the due process clause of the Federal Constitution. In Jordan v. Mass., 225 U. S. 167, a situation was involved where one of the jurors had become insane shortly after the conviction of an accused. An inquiry was conducted to determine the sanity of such juror at the time of the trial, and under the Massachusetts procedure this was determined by a preponderance of evidence only and not beyond a reasonable doubt. This procedure was sustained. In Garland v. Wash., 232 U. S. 642, a conviction was upheld where the accused was neither arraigned nor had he pled to the information. In Frank v. Mangum, 237 U. S. 309, a rule of procedure invoked by the state court by which the accused was held to have waived, by failing to make the objection in his motion for new trial, the mandatory provisions of the Georgia statute requiring the presence of the accused at all times during the course of the trial, was sustained. In this case Justice Pitney said: "There is nothing in the 14th amendment to prevent a state from adopting and enforcing so reasonable a regulation of procedure." Id. 339, 340. Mr. Justice Holmes, who dissented in this case on the effect of the alleged mob violence did not dissent on this proposition, but on the other hand stated: "We never have been impressed by the argument that the presence of the prisoner was required by the Constitution of the United States." Id. 346.

Nor do we find that statutes which dispense with an allegation of venue in the body of the indictment or information, where place is not an essential ingredient of the offense, are novel in statute law. England in 1851 passed a statute dispensing with the statement of venue in the body of the indictment, providing that a setting down of the county in the margin is sufficient. 1 Bishop New Criminal Procedure, Secs.

368, 385. There are similar statutes in a number of states of the Union. Section 4902 of the Code of Alabama of 1896 provides as follows:

> "It is not necessary to allege where the offense was committed; but it must be proved on the trial to have been committed within the jurisdiction of the county in which the indictment is preferred."

This statute has been sustained by a line of decisions of the Alabama Supreme Court, starting with Noels's case, 24 Ala. 672, wherein the court held that the legislature had the power to dispense with the necessity of averring venue. The court said:

> "The accusation of the commission of the crime is the gravamen of the indictment. This cannot be dispensed with; but the particulars as to time, place and circumstances, not constituting essential elements of the crime, may be dispensed with in the indictment by the statute, and be left as a matter of proof as establishing the jurisdiction of the court."

Tennessee has a statute similar to the Alabama statute which was construed by the Supreme Court of that state in State v. Quartamus, 3 Heisk, 65. We quote from the short opinion in this case:

> "The indictment in this case was quashed by the County Court of Knox County, upon motion of defendant, and the Attorney General appealed in error to this court. The objection to the indictment, which is for profanity, is that it does not allege that the profane words were spoken in Knox County. While the better practice is, in all cases, to state the venue in the body of the indictment, by Section 5125 of the Code, it is provided that 'It is not necessary for the indictment to allege where the offense was committed, but the proof shall show a state of facts bringing the offense within the jurisdiction of the county in which the indictment was preferred.

"This section of the Code is not in conflict with the 9th section of Article 1 of the Constitution, which declares that the accused has a right to demand the nature and cause of the accusation against him and to have a copy thereof. These are fully set out in the indictment, and the law requires that the proof should show that the offense was committed in the county in which the indictment was preferred.

"It was therefore error to quash the indictment for the omission in the indictment to charge in which county the offense was committed."

Louisiana has a statute providing that it shall not be necessary to state any venue in the body of the indictment, but the venue named in the margin shall be taken to be the venue for the facts stated in the body of the indictment. See Sec. 1062, R. S. Another statute provides that no indictment shall be held insufficient for want of a proper or perfect venue. 1064, R. S. These statutes have been uniformly upheld by the Supreme Court of that State. State v. Wood, 136 La. 658, 67 So. 542.

Missouri has similar statutes, 5107 and 5115, Rev. St. 1909. See State v. McDonough 232 Mo. 219, 134 S. W. 545.

Massachusetts has a statute, Sec. 20, Chapter 218, Rev. Laws, which provides:

"The time and place of the commission of the crime need not be alleged unless it is an essential element of the crime, . . . the name of the county and court in the caption shall, unless otherwise stated be considered as an allegation that the act was committed within the territorial jurisdiction of the court."

This was construed and upheld in Com. v. Rogers, 181 Mass. 184, 63 N. E. 421. This statute also came before the United States Supreme Court in Hogan v. O'Neill, 255 U. S. 52, 61 L. ed. 497.

As will be seen, the statutes of two states, Alabama and Tennessee, dispensed with an allegation of venue entirely. The statutes of the other states provide that a statement of venue may be dispensed with in the body of the pleading, and the venue shall be considered as laid in the margin or caption. The South Dakota statute provides that an allegation of venue may be dispensed with under certain conditions where here exist.

Moreover, under the authorities there is a sufficient allegation in the information that the offense was committed within the jurisdiction of the state. The information is entitled in the state of South Dakota, and the action is brought in the name of the state of South Dakota; the charge is made therein by the state's attorney of Minnehaha County, South Dakota, and the offense is alleged to have been committed against the statute and the peace and dignity of the state of South Dakota.

Bishop in his New Criminal Procedure, Second Edition, Section 383, states as follows:

> "Allegation of State.—It is customary to write the name of the state in the margin, in connection with that of the county. But the former need not appear either there or in any other part of the indictment, unless required by the terms of the constitution or a statute." He states the following authorities among others in support of the proposition: State v. Walter, 14 Kan. 375; State v. Simpson (Me.), 39 Atl. 287; Com. v. Quinn (Mass.), 5 Gray 478; State v. Wentworth, 37 N. H. 196, 220; State v. Jordan, 12 Tex. 205.

Bishop in the above work has an interesting discussion of the historical origin of venue, Id. Section 362, Seq. He points out that jurors originally were chosen from the immediate neighborhood where the offense was committed for their knowledge of an offense. Hence the requirement by the common law

was originally that the indictment must designate the particular locus of the offense. Later, as jurors lost their character as witnesses, and became simply judges of the facts, they were summoned from an entire county. Hence, the doctrine was modified to make an allegation of the county sufficient. In modern times jurisdiction of courts has been extended beyond the territory limits of counties, and here in South Dakota the jurisdiction of the circuit court extends throughout the state. Upon the principle, then, that the allegation of venue may be as broad as the jurisdiction of the court, an allegation that the offense was committed within the state would be sufficient. In State v. Walter, 14 Kan. 374, supra, the opinion states:

> "Mr. Bishop lays it down thus: 'It is customary in the United States to write the name of the state in the margin, in connection with the name of the county. But there is no need of the name of the state to appear, either in the margin or in any other part of the indictment.' L Crim. Prac., paragraph 106. The rule as thus stated is supported by the following cases: State v. Jordan, 12 Tex. 205; State v. Lane, r. Iredell, 113; Com. v. Shaw, 7 Metc. 52; Com. v. Quinn, 5 Gray 478. In this case we need not go as far as these authorities justify, for the offense is alleged as against the peace and dignity of the state of Kansas, which could not well be true unless the offense was committed within the state." Under the above authorities, the information in this case was certainly sufficient to inform the defendant that it was claimed that the offense was committed within the state of South Dakota.

The effect of the South Dakota statutes with respect to setting forth the venue in the information, is that ordinarily such information should affirmatively state the facts that show the alleged offense was committed within the jurisdiction of the Court. But if the accused does not demur thereto, the Court may proceed to try him. The filing of the information in

the Court without the accused challenging the form of the information in the way pointed out by statute, is regarded as a sufficient assertion of the jurisdiction of the Court.

Tested by the rules and principles laid down by the United States Supreme Court for due process of law, we find in our case that South Dakota has by law created a court and given it authority by law to try and determine offenses against the laws of the state. We find that the South Dakota court proceeded in accordance with the statutes enacted to govern its procedure. Jurisdiction comes from the law. Here was a court created under the law and acting under the law. The circuit court had jurisdiction to try Mr. Egan for the offense charged in the information. The essential that there shall be a court having jurisdiction to act existed in the present case.

The other essentials are notice and an opportunity to be heard. Were these elements lacking in the present case? As has been seen, the accused was given notice by the information that he was charged with a violation of the statute of South Dakota. The filing of the information in the Circuit Court of Minnehaha County was notice to him that that Court claimed jurisdiction of the offense. The facts constituting the offense were stated in the information. If there were any matters relating thereto upon which he needed information in order to prepare for his defense, according to the established procedure in South Dakota, he might demand and secure a bill of particulars of such matters. State v. Otto, 38 S. D. 353; 161 N. W. 342. In Hodgson v. Vermont, 168 U. S. 262, the United States Supreme Court in sustaining a prosecution in a state court referred to the right which the accused had to secure a bill of particulars of the charge. The court said:

"The defendant being entitled to a specification as a matter of right, under the decision of the Supreme Court of the state, the question of the

validity of the information in the absence of any specification is not presented by this case."

In addition the Supreme Court of the State of South Dakota had adopted rules to guide trials in the circuit court pursuant to the requirement of a statute. (Chapter 163, Session Laws 1919.) Such rules were published in Vol. 1, S. D. Revised Code 1919. Rule 24 thereof provides as follows:

"In criminal cases, the jury having been duly impanelled, the trial must proceed in the following order:

"(a) The State's Attorney must read to the jury the indictment or information and state the plea of the defendant, and also state to the jury without argument, the general nature of the evidence upon which the state will rely to secure a conviction."

The rules of court have the force of substantive law.

Presho State Bank vs. N. W. Milling Co., 45 S. D. 14, 185 N. W. 370.

Thus, the established procedure is ample in providing means for fully informing the accused of the nature and cause of the accusation. Petitioner did not at the trial demand a bill of particulars. He did not by his objections to the information suggest that he was not fully informed as to the particulars of the charge. His objection went merely to the technical sufficiency of the information to give the court jurisdiction. The case was tried upon the theory that the offense was alleged to have been comitted in Minnehaha county, South Dakota. The trial judge so instructed the jury, and required the jury to find that fact established by the evidence as a condition of returning a verdict of guilty. (R. 88, 92). The accused had a full opportunity to be heard upon this as upon every other issue of fact involved in the charge. He does not claim that he did not have a fair trial. His objection is simply to the technical sufficiency of the information. Petitioner's objections are of the tech-

nical character characterized by the late Mr. Justice Day in Garland vs. Washington, 232 U. S. 642, in the following language:

"Technical objections of this character were undoubtedly given much more weight formerly than they are now. Such rulings originated in that period of English history when the accused was entitled to few rights in the presentation of his defense, when he could not be represented by counsel, nor heard upon his oath, and when the punishment of offenses, even of a trivial character, was of a severe and often of a shocking nature. Under that system the courts were disposed to require that the technical forms and methods of procedure should be fully complied with. But with improved methods of procedure and greater privileges to the accused, any reason for such strict adherence to the mere formalities of trial would seem to have passed away. * * *"

The Court also said elsewhere in the opinion in Garland vs. Washington, supra:

"Due process of law, this court has held does not require the state to adopt any particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution. Rogers vs. Peck, 199 U. S. 425, 435, 50 L. ed. 256, 260, 26 Sup. Ct. Rep. 87, an previous cases in this court there cited. Tried by this test it cannot for a moment be maintained that the want of formal arraignment deprived the accused of any substantial right, or in any wise changed the course of trial to his disadvantage. All requirements of due process of law in criminal trials in a state, as laid down in the repeated decisions of this court, were fully met by the proceedings had against the accused in the trial court. The objection was merely a formal one, was not included in the general language in which the objection to the introduction of evidence was interposed before the trial, and was evidently re-

served with a view to the use which is now made of it, in an attempt to gain a new trial for want of compliance with what in this case could have been no more than a mere formality."

In the present case the objection by the accused to the introduction of evidence was entirely a technical objection to the form of the information. He objected to the jurisdiction alone because of the form of the information. He did not object that the court did not have jurisdiction over the subject matter of the action. He did not object on the ground that the information had misled him in any way, or was calculated to mislead him. He did not by his objection suggest to the court that he did not know where the state claimed the offense was committed. A suggestion of this nature would have brought a bill of particulars, to which accused was entitled upon request. State vs. Otto, 38 S. D. 353, 161 N. W. 340. He did not suggest that he needed further information in order to prepare for his defense. The case was tried upon the theory that the offense was committed in Minnehaha county, South Dakota, where the action was pending. That was the issue as to place to which the evidence introduced was directed. The instructions submitted this issue as to place to the jury for a finding thereon, and upon which the jury must have found by the verdict of guilty. Paraphrasing Justice Day in his opinion in the Garland vs. Washington case, supra, the failure of the information in this case to state the venue in no wise changed the course of the trial to the disadvantage of the accused. He had full notice from the information that the offense was claimed to be a violation of the laws of the State of South Dakota and that the Circuit Court in Minnehaha County was asserting jurisdiction to try him for the offense. He had full opportunity to be heard upon the facts that were alleged to constitute this offense. He was tried in a court created by the laws of the state of South Dakota, and given authority by the laws to hear and determine charges of felony. The court proceeded

according to the forms prescribed by the laws of the state. In other words, there were present all of the elements necessary to give due process of law, a court having jurisdiction of the subject matter, a notice to the accused and opportunity to be heard. In view of the foregoing we assert with confidence that it will be held that the accused was not denied due process of law.

PROPOSITION V.

At the hearing in the Federal District Court, Egan contended that in his trial in the State Court, the prosecution did not prove the commission of the crime within Minnehaha County, and therefore the State Court was without jurisdiction. Egan did not bring before the District Court the bill of exceptions or settled record which contain the evidence that was presented to the court at the second trial. Over the objections of the respondent he presented to the court the brief of the evidence and law which petitioner as appellant presented to the Supreme Court of South Dakota upon the second appeal. Manifestly this was incompetent as evidence of what was presented to the trial court. This could only be presented by a full transcript of the evidence given in the State Court, or a bill of exceptions of the proceedings. However, the District Court did attempt to make inquiry upon the record presented as to the evidence before the State Court, concluded that no evidence of venue was presented at the trial, and that this ousted the Court of jurisdiction.

The Circuit Court of Minnehaha County is a Court of general jurisdiction. Assuming that the information was not absolutely void, any determination that this Court might make as to the effect of evidence presented to it would not be void, but would be conclusive as against a collateral attack by habeas corpus.

Courts of general jurisdiction are courts which take cognizance of all causes, civil or criminal, of a particular nature. 15 C. J. 718 (2).

The distinction between courts of original and general jurisdiction over any particular subject, and courts of special and limited jurisdiction, is this: the former are competent by their constitution to decide upon their own jurisdiction, and to exercise it to a final judgment, without setting forth in their proceedings the jurisdictional facts and evidence upon which it is rendered. Their records import absolute verity and cannot be impugned by averment or proof to the contrary; there can be no judicial inspection behind the judgment, save by appellate power. 15 C. J. Id.

Where a court of general jurisdiction has exercised its powers, it will be presumed, unless the contrary appears of record, that it had jurisdiction both of the subject matter of the action and of the parties, for, as the first duty of all courts is to keep strictly within the limits of their jurisdiction, any affirmative act on the part of a court implies that it has ascertained that it has jurisdiction so to act. Conversely, no presumption against jurisdiction can be indulged, nor should anything be presumed to be outside of the jurisdiction of a court of general jurisdiction. It accordingly will be presumed that all the facts necessary to give the court jurisdiction to render the particular judgment were duly found, and that every step necessary to give jurisdiction has been taken. 15 C. J. 827 (146).

Upon the question of the review of evidence, in a habeas corpus case, Chief Justice Taft, then Circuit Judge, in re Haskell, 52 Fed. 795, said:

> "The failure of the state of Ohio to prove the venue of the offense in Lucas county, as alleged by the petitioner can only be made to appear from a consideration of the bill of exceptions stating all the evidence; but the bill of exceptions is not a part of the record of a judgment into which a court may look, in a proceeding where the judgment is collaterally attacked. It is only a part of the record in direct proceedings on error for the examination of a

reviewing court, and can never be considered in habeas corpus to test the validity of the judgment."

This matter has been recently considered by the U. S. Supreme Court in the case of Harlan vs. McGourin, 218 U. S. 442. In this case the court said:

"It is contended that an examination of the bill of exceptions will disclose that the alleged conspiracy was not formed in the northern district of Florida as laid in the indictment; that there is a total lack of evidence to connect the petitioners with any such conspiracy; that the petitioners (notably the petitioner Harlan) are not shown by any competent testimony to have been concerned in any overt act for the carrying out of the alleged conspiracy; that it is not shown that there is any condition of peonage in which Lanninger had been detained and to which he could be returned, in violation of Section 5526 of the Revised Statutes of the United States. In other words, in this feature of the case this court is asked to review the testimony adduced at the trial, with a view to determining the lack of evidence in the record to support the verdict and judgment, although such matters were properly reviewable, and were in fact reviewed, in the error proceedings already referred to.

"The contention is that in the respects pointed out the testimony wholly fails to support the charge. The attack is thus not upon the jurisdiction and authority of the court to proceed to investigate and determine the truth of the charge, but upon the sufficiency of the evidence to show the guilt of the accused. This has never been held to be within the province of a writ of habeas corpus. Upon habeas corpus the court examines only the power and authority of the court to act, not the correctness of its conclusions."

This case is reported in Vol. 21 of Annotated Cases, page 849, and appended to this case is a note collecting the authorities, which are to the effect that

where a person has been tried by a court having jurisdiction, the sufficiency of the evidence adduced to sustain the conviction will not be reviewed in habeas corpus proceedings.

It may be thought that something has been said by the United States Supreme Court in Frank v. Mangun, 237 U. S. 309, or Moore v. Dempsey, 261 U. S. 86, which is contrary to the view in Harlan v. McGourin, supra. In a case later than either of these, Riddle v. Dyche, 262 U. S. 333, the court says that in habeas corpus proceedings the court cannot inquire into facts which contradict the record. The court there says the Frank case was not intended to decide otherwise.

We do not for a moment concede that there was no evidence in proof of venue. The trial court found the evidence ample, and the Supreme Court upon the appeal also so found. Judge Polley states in the opinion:

> "We have the appellant's written and signed declaration that he did present said proof of loss to the agent of the said insurance company in Sioux Falls. On the 10th day of January the day following the day on which appellant made out the said proof of loss, appellant wrote the following letter addressed to
>
> > 'Firemen's Insurance Company, F. C. Whitehouse & Co., Sioux Falls, S. D. I am handing you herewith a more elaborate and specific proof of loss, estimate of cost of rebuilding, and general information so far as I am able to give it, in connection with the destruction by fire of my building on which you held insurance, November 24th, 1919.'
>
> This letter containing the 'more elaborate and specific proof of loss,' was mailed to and received by said insurance agency in Sioux Falls. This letter uncontradicted was sufficient foundation for the inference that the proof of loss was presented to said

insurance company through its agent in Sioux Falls, Minnehaha County." (47 S. D. —, 195 N. W. 642, 645).

It is to be noted further that Egan does not claim that the proof of loss was not in fact presented to the agent of the Insurance Company in Sioux Falls. He did not offer to prove to the Federal District Court that this was true. If the act was committed there, it was an offense for which the Minnehaha County Circuit Court had authority to try Egan, irrespective of what evidence was presented at the trial. It is plain that the question of what evidence was presented at the trial is not one that affects the jurisdiction of the Court, and cannot become the basis of relief by habeas corpus.

PROPOSITION VI.

Egan contended before the District Court that the statute of South Dakota under which he was prosecuted had been repealed by implication by later legislation. An inquiry into this by the Federal Court is precluded by the decision of the Supreme Court of the State. We cite only a few of the many authorities upon this proposition.

In Re Duncan v. McCall, 139 U. S. 449, 460, 462.

Bergemen v. Backer, 157 U. S. 655.

Howard v. Flemming, 191 U. S. 126.

Farncomb v. Denver, 252 U. S. 7, 64 L. ed. 424.

Qwong Ham Wah Co. v. Industrial Accident Commission, 255 U. S. 445, 65 L. ed. 723.

In Duncan vs. McCall, supra, the court said:

"The State of Texas is in full possession of its faculties as a member of the Union, and its legislative, executive and judicial departments are peacefully operating by the orderly and settled methods prescribed by its fundamental law. Whether certain statutes have or have no binding force, it is for the State to determine, and that determination in itself involves no infraction of the Constitution of

the United States, and raises no federal question giving the courts of the United States jurisdiction."

In Howard v. Fleming, 191 U. S. 126, we find the following:

"We premise that the trial was had in a state court, and therefore our range of inquiry is not so broad as it would be if it had been in one of the courts of the United States. The highest court of the state has affirmed the validity of the proceedings in that trial, and we may not interfere with its judgment unless some right guaranteed by the Federal Constitution was denied, and the proper steps taken to preserve for our consideration the question of that denial.

"The first contention demanding notice is that the indictment charged no crime. As found it contained three counts, but the two latter were abandoned, and therefore the inquiry is limited to the sufficiency of the first. That charged a conspiracy to defraud. There is in North Carolina no statute defining or punishing such a crime, but the supreme court held that it was a common-law offense, and as such congnizable in the courts of the state. In other words, the supreme court decided that a conspiracy to defraud was a crime punishable under the laws of the state, and that the indictment sufficiently charged the offense. Whether there be such an offense is not a Federal question, and the decision of the supreme court is conclusive upon the matter. Neither are we at liberty to inquire whether the indictment sufficiently charged the offense."

The same principle applies to all questions of construction of State Statutes involved herein. Were these open to review in this court, we would be quite ready to meet the issue upon the merits, as we did in the State Court. Not being at issue, we forbear further discussion.

PROPOSITION VII.

Motions to Substitute and to Intervene.

There has been filed by the attorneys for appellant

a Motion to Substitute for the appellant of record, Vincent L. Knewel, as Sheriff of Minnehaha County, his successor in office, George Boardman. The latter succeeded to that office on January 6, 1925. There was also filed by the Attorney General of South Dakota and by the attorneys of record for appellant in behalf of the state of South Dakota, a Motion on the part of the state to be allowed to intervene and become a party to this suit. The basis of the Motion to Intervene is the interest that the state had in the habeas corpus suit, it appearing that Egan had been convicted of a crime and sentenced to imprisonment and was in custody by virtue of the judgment of the State Court. It furthermore appeared from the affidavit of Byron S. Payne, (Appendix page 65) filed in support of the said Motions, that the State had appeared in the District Court in the habeas corpus suit by its Attorney General and other counsel representing it, and had borne the entire cost of defending against the application of Egan for a release from custody, and had through its counsel and law officer taken this appeal and borne the cost thereof. These Motions were submitted to the Supreme Court on January 26, 1925, and an order later was made continuing the hearing thereon until April 13th, next, in connection with the argument and hearing on the merits of the case on that date.

In support of the Motion to Substitute Boardman as a successor in office to Knewel, Section 2317 of the South Dakota Code was cited, and reference was made to Thompson v. U. S., 103 U. S. 480, 484; also to 1 C. J. 146, Sec. 230. It was thought at the time the Motion was presented that the case now before the Court, so far as the officer was concerned, involved the discharge by him of a continuing duty as Sheriff of Minnehaha County, and that duty having devolved upon his successor, the latter would be a proper party to this suit. Our attention is now called to the cases Gorham Mfg. Co. vs. Wendell, 261 U. S. 1, and Irwin vs. Wright, 258 U. S. 219. In these cases it is stated:

"A suit to enjoin a public officer from enforcing a statute or to compel him to act by mandamus is personal, and in the absence of statutory provision for continuing it against his successor, abates upon his death or retirement from office." It was said further therein that the Federal Courts can avail themselves of any state provision for substitution for retiring state or county officers of their successor in office in such suits. In Gorham Mfg. Co. vs. Wendell, it was further stated that where such officers consent to the substitution, the Federal Courts need not be astute to enforce the abatement of the suit if any basis at all can be found in state law or the practice of the state Courts for substitution of the successors in office. In that case, the practice of the State Courts in allowing substitution as shown by a decision of the State Court was accepted as a sufficient basis for the substitution in the Federal Court.

In Irwin vs. Wright, supra, a statute of New Mexico, similar to Section 2317 of the South Dakota Code was considered and held insufficient to justify the substitution of a successor in office.

The Courts of many states under statutes similar to the South Dakota statute approve the substitution of a successor in office for a defendant in mandamus and injunction cases.

People vs. Treasurer, 37 Mich. 351.

Stone vs. Bell, 35 Nev. 240; 129 Pac. 458.

Otto Hdwe. Co. vs. Holmberg, 36 Cal. App. 402; 179 Pac. 422.

The California Court in the above case refers to Sec. 385 Cal. Code of Civil Procedure, which is in the exact language of Sec. 2317 of the South Dakota Code. The California Code is the older, and it is known that the South Dakota procedure statutes were based upon the California Code.

We have been able to find no decision of the South Dakota Supreme Court expressly approving the practice of substituting the successor in office for the de-

fendant in mandamus and injunction cases. However, it is the observation of the writer of this brief as a practitioner before the Courts of South Dakota for a period of twenty years, that the practice of permitting either the substitution of the successor in office in such cases, or the continuance of the case in the name of the officer against whom the action was originally brought, even though he had retired from office, has been generally accepted by the bar of the state and by the courts as the approved practice. As an example of the acceptance of this practice by the bar of the state, we refer to the case of Wells Fargo and Co. vs. Johnson, State Treasurer. This was an action in the Federal District Court, District of South Dakota, by an express company to restrain the State Treasurer of South Dakota from enforcing a taxation statute. Johnson left office in January, 1913, and the case was tried on February 19, 1913, after he had actually left office. See opinion of the District Court, 205 Fed. 60. Decision was for the defendant. The express company appealed to the Circuit Court of Appeals and the decision was reversed. 214 Fed. 180. Appeal was then taken by the authorities of South Dakota to the Supreme Court of the United States, and the case decided November 29th, 1915, nearly three years after Johnson had left office. See Johnson vs. Wells Fargo and Co., 239 U. S. 234. We do not claim that Johnson's retirement from office was suggestive to the Supreme Court, but cite the carrying on of this litigation by leading practitioners of the state in the name of the officer who had retired from office as evidence of the practice accepted by the bar of the state.

However, this is not a mandamus or injunction suit, and we believe without question, this is not a suit which does abate because Knewel has left the office of Sheriff. Habeas corpus is an extraordinary remedy to inquire into the cause of the detention of a person restrained of his liberty. It is a proceeding of a civil nature, was known to the Common Law, and is regulated in the Federal Courts by Federal statutes.

A most instructive discussion of the nature of the proceeding is found in Simmons vs. Georgia Iron and Coal Company, 117 Ga. 305; 43 S. E. 780; 61 L. R. A. 739.

"The proceeding is sometimes characterized as a 'cause' or 'action,' but erroneously so; and it has been called a civil or criminal proceeding, according to whether the person is held in custody on a criminal charge, or by private restraint. While instances may arise where it is important to determine whether it is a civil or criminal proceeding, it can never be accurately characterized as a technical suit or action. See, in this connection, 15 Am. & Eng. Enc. Law, pp. 157, 158; Spelling, Extr. Relief, Sec. 1161. It may be analogized to a proceeding in rem, and is instituted for the sole purpose of having the person restrained of his liberty produced before the judge, in order that the cause of his detention may be inquired into, and his status fixed. The person to whom the writ is directed makes response to the writ not to the petition. 9 Enc. Pl. & Pr. p. 1035. When an answer is made to the writ, the responsibility of the respondent ceases. See in this connection, Barth v. Clise, 12 Wall. 400, 20 L. ed. 393. The Court passes upon all questions, both of law and fact, in a summary way. The person restrained is the central figure in the transaction. The proceeding is instituted solely for his benefit. It is not designed to obtain redress against anybody, and no judgment can be entered against anybody. There is no plaintiff and no defendant, and hence there is no suit, in a technical sense. The judgment simply fixes the status of the person for whose benefit the writ is issued; * * * The respondent, in his answer to the writ, seeks simply to justify his conduct, and relieve himself from the imputation of having imprisoned without lawful authority a person entitled to his liberty. He comes to no issue with the applicant for the writ. He answers the writ. The applicant may traverse the answer, and thus take issue

with the respondent as to the truth or legal effect of the facts which he sets up. If, upon an investigation into the matter, it appears that the detention was without color of authority the person detained will, of course, be discharged; and he may bring a civil action for damages, or prosecute the person by whom he was restrained of his liberty for false imprisonment. But the proceeding itself is not in any sense a suit between the applicant and the respondent."

By Section 761 of the Revised Statutes (Comp. Stat. Sec. 1239, 3 Fed. Stat. Anno. 2nd Ed. p. 469) the duty of a United States Court in habeas corpus proceedings is prescribed as follows:

"The court, or justice or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

This is an exceedingly broad statute. The command is to dispose of the party as law and justice require. The mandate of the Statute in this particular applies whether the Federal Court is exercising original or appellate jurisdiction. Storti vs. Mass., 183 U. S. 138; 46 L. ed. 120; 22 Sup. Court 72. The proceeding is in no sense a private suit between the petitioner and the officer or person holding the petitioner in custody and to whom the writ is directed. When the person imprisoned is brought before the Court, he is detained solely under the authority of the writ of habeas corpus, and is responsible to the authority of the Court issuing the writ alone. The original authority for his detention is entirely superceded. 12 R. C. L. page 1251, Sec. 69; Barth vs. Clise, 12 Wall. 400; 20 L. Ed. 393.

The command of the statute is that such disposition must be made of the matter as law and justice require. The particular custody may be found to be illegal, but that does not entitle the petitioner to a

discharge if other grounds for his detention are shown. Coleman vs. Tennessee, 97 U. S. 509; 24 L. Ed. 1118; Mahler vs. Eby, 264 U. S. 32, 46; 68 L. Ed. 547, 557. In re Medley, 134 U. S. 45; 33 L. Ed. 835; In re Bonner, 151 U. S. 242; 38 L. Ed. 149; United States vs. McBratney, 104 U. S. 621, 624; 26 L. Ed. 869, 879; 29 C. J. 173, Sec. 195.

Where the person is held by other than the proper authorities, or in other than the proper place, he may be remanded to the custody of the proper authorities for confinement in the proper place. Givens vs. Zerbst, 255 U. S. 11, 22; 65 L. Ed. 475, 481; In re Bonner, 151 U. S. 242; United States vs. McBratney, 104 U. S. 621; Coleman vs. Tennessee, 97 U. S. 509.

It will thus be seen that the Court disposes of the party and the matter without reference to the parties before it. Indeed, the statute imposes this duty, the command being to act as law and justice require. The only indispensable party before the Court is the petitioner; all other parties are incidental. In Ex Parte Milligan, 4 Wall. 2, 112, there had been no return and there was no adverse party before the Court. See Ex Parte Watkins (3 Peters 193, 201) where the matter was disposed of upon the petition without a return. If other parties appear, it is for the purpose of aiding the Court in disposing of the matter rightly. The statute requires the officer who is holding the petitioner in custody to make a return for that purpose. The Court can very properly hear anyone having an interest in the cause of the imprisonment to the same end.

In a case such as this where the petitioner is in custody under a judgment of a state court for a criminal offense, it is generally recognized that the state is an interested party. State vs. Gordon, 105 Miss. 454; 62 So. 431; Keyes vs. Buckham, 29 Minn. 462; 13 N. W. 912; Burr vs. Foster, 138 Ala. 41; 31 So. 495; State vs. Davis, 56 Ala. 181; 47 So. 182. See

also, Ex Parte Milligan, 4 Wall. 2, 114; and Durner vs. Huegin, 110 Wis. 189; 85 N. W. 1046; 62 L. R. A. 700. See also note in 10 A. L. R. page 396e.

So also, the officer from whose custody a person has been discharged on habeas corpus is usually held to be an interested party. Edmundson vs. Ramsey, 122 Miss. 450, 84 So. 455; 10 A. L. R. 380; Yudkin vs. Gates, 60 Conn. 426; 22 Atl. 776; State Ex Rel. Berry vs. Merrill (1901) 83 Minn. 252, 86 N. W. 89; State Ex Rel. Bond vs. Langum (1917) 135 Minn. 320; 160 N. W. 858; Miller vs. Gordon (1914) 93 Kan. 382; 144 Pac. 272; State Ex Rel. Durner vs. Huegin, supra; Palmer vs. Buck, 83 Mich. 528; 47 N. W. 355. See note to 10 L. R. A. 396e.

In the Federal Courts it has been recognized that the state or government under whose authority the party is imprisoned, as well as the officer who is the particular agency for the detention, each has an interest in the habeas corpus inquiry. Re Taylor, 3 McArth. (D. C.) 426; Leonard vs. Rodda, 5 App. D. C. 256; Ex parte Milligan, 4 Wall. 2, 114; Ornelas vs. Ruiz, 161 U. S. 502; 40 L. Ed. 787; Collins vs. Miller, 252 U. S. 364; 64 L. Ed. 616. See note in 10 A. L. R. pp. 403, 404h. In the suit Re Taylor, supra, an appeal taken at the instance of the district attorney, acting under instructions from the Attorney General of the United States, was declared proper. In Leonard vs. Rodda, supra, the opinion states that the officer rather than the government is the formal party to the record, and an appeal should be taken in the name of the officer. In Ex Parte Milligan, supra, the appearance of the United States District Attorney in behalf of the government was approved as proper. In Ornelas vs. Ruiz, supra, the Mexican Consul had made a complaint for the extradition of a fugitive from his country. He was allowed to prosecute an appeal on behalf of his government from a decision in habeas corpus discharging the person accused. The Court said:

"The official character of this officer must be

taken as sufficient evidence of his authority," and that, "As the government he represented was the real party interested in resisting the discharge, the appeal was properly prosecuted by him on its behalf." On the other hand in Collins vs. Miller, supra, Mr. Justice Brandeis suggested that the appeal should be taken by the officer from whose custody the petitioner had been discharged, rather than by the representative of a foreign government.

The Federal Statutes provide for an appeal in habeas corpus cases, but do not prescribe by whom such appeal shall be taken. So far as we have been able to ascertain, the Supreme Court under the authority of Section 765 of the Revised Statutes has not formally prescribed the practice for such appeals. The decided weight of authority is to the effect that it is proper for the appeal to be taken in the name of the officer. That was the practice adopted in this case before the Court. The appeal was taken in the name of the Sheriff and at the instance and under the direction of the Attorney General of the state and other counsel representing the state authorities. This Court, therefore, regularly obtained jurisdiction of this cause.

The foregoing review of the authorities and a consideration of the nature of the habeas corpus proceeding and its purpose, and the broad powers and duty conferred upon the Court by the statute, makes it clear that the habeas corpus proceeding does not abate by the Sheriff going out of office. Indeed, the officer is not a necessary party to the proceeding at all. Without regard to who is heard, or who is the formal party to the record, the duty still remains upon this court under the statute to make the inquiry as to the cause of the detention of the party involved, and to dispose of him rightly, according to the law and justice of the case.

However, should it be determined that the custody of Egan by the State authorities was lawful, the duty to retake Egan into custody, and execute the judgment of the State Court, has devolved upon Knewel's successor, Boardman. Since the Motion was submitted

to the Court, Boardman has filed with the Clerk written consent to be made a party to the proceeding. It would seem proper practice to admit him to be heard so that he would be bound by the judgment of this Court, whatever that judgment may be.

On the other hand, the foregoing authorities and considerations would seem to indicate that the State through its legal officer, the Attorney General, and through other counsel representing the State, should properly be heard by the Court in disposing of the case. This does not mean necessarily that the State should be made a formal party to the record, but that its interest in the proceeding should be recognized by allowing the State to be heard.

Counsel are asking that this brief be filed in behalf of the formal appellant to the record, and also in behalf of the State of South Dakota, and in behalf of the said George Boardman, as Sheriff of Minnehaha County, South Dakota, should he be permitted to participate in the case.

CONCLUSION

This is an ordinary habeas corpus case. The party involved was detained under a judgment of the State Court. To secure relief by habeas corpus, he must show that the judgment was absolutely void, and that the State Court was absolutely without jurisdiction to pronounce it. The judgment is regular upon its face, it was given by a court created by the laws of the state, and given general jurisdiction to determine charges of violation of law. The offense charged is known to the law, and the Court had jurisdiction over the person of the accused. The defects asserted which caused lack or loss of jurisdiction, are, first, as to the form of the information, and second, as to the sufficiency of the evidence presented to the State Court. Neither of these defects reach the question of the jurisdiction of the Court to try the accused for the offense. It is claimed that the information did not state the County in which the offense was alleged to have been committed. We have shown that the filing of the information and the accused's plea of "not guilty" there-

to, without challenging the sufficiency of the information in the mode prescribed by statute, constitutes under the statutes a sufficient assertion that the offense was committed within the jurisdiction of the Court. The Court not only had jurisdiction to proceed upon the information, but it accorded to Egan due process of law in proceeding thereupon. That the Court refused to permit Egan to withdraw this waiver of his right to challenge the form of the information, cannot be made the basis of an attack upon the jurisdiction. That waiver had stood for some two years under which he had elected to speculate upon the result of one trial of his case. Neither can the Court's jurisdiction to hear a cause be made to depend upon the sufficiency of the evidence presented to the Court, nor its jurisdiction be challenged by an attack upon its conclusions relating to such evidence. Habeas corpus is not a proceeding to review rulings claimed to be erroneous.

We submit to this Court that the order of the District Court granting discharge to Egan from custody was clearly wrong and erroneous. That order should be reversed and the District Court should be directed to make an order vacating same and remanding Egan to the custody of the Sheriff of Minnehaha County.

This Brief is submitted in behalf of Knewel, as Sheriff of Minnehaha County, South Dakota, in whose name the appeal to this Court was taken, and in behalf of the State of South Dakota because of its interest in this cause, and also in behalf of George Boardman, successor to Knewel, should he be permitted to become a party hereto.

Respectfully submitted,
BUELL F. JONES,
Attorney General of South Dakota.
BYRON S. PAYNE,
SAMUEL HERRICK,
J. D. COON,
State's Attorney of Minnehaha County,
Counsel for the above named parties.

APPENDIX.

Section 14, Art. 5, Constitution of South Dakota:

"The circuit courts shall have original jurisdiction of all actions and causes, both at law and in equity, and such appellate jurisdiction as may be conferred by law and consistent with this constitution; such jurisdiction as to value and amount and grade of offense may be limited by law. They and the judges thereof shall also have jurisdiction and power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction and other original and remedial writs with authority to hear and determine the same."

(All the statutes quoted or referred to are from the South Dakota Revised Code of 1919 unless otherwise stated.)

Sec. 4653. "*Criminal Jurisdiction.* The circuit court has exclusive original jurisdiction to try and determine all cases of felony, and original jurisdiction concurrent with the municipal court, and with the county court in counties having a population of ten thousand or over, to try and determine all cases of misdemeanor. It has appellate jurisdiction concurrent with the county court, in counties having a population of ten thousand or over, of appeals from justices' courts in criminal actions triable in such courts. It has jurisdiction to inquire into the cause of detention of all persons imprisoned in the jail of the county or otherwise detained, and to make an order for their recommitment or discharge, or otherwise according to law, and to exercise such other powers as are conferred by the constitution and statutes of this state."

Sec. 4654. "*Always Open for Certain Purposes.* The circuit court is always open for the purpose of hearing and determining all actions, special proceedings motions and applications of whatever kind of character, of a criminal nature, arising under the laws of this state and of which it has jurisdiction,

original or appellate, except issues of fact in criminal cases; and all such actions, special proceedings, motions and applications may be heard and determined at any place within the judicial circuit in which is situated the county wherein the same is brought or pending; but issues of fact in any criminal action must be tried in the county in which the same is brought or to which the place of trial is changed by order of the court: Provided, however, that nothing in this section shall be construed to prevent the judge of any circuit court from making any order at chambers at any place within the state, in any criminal matter properly before him."

Sec. 4655. "*Criminal Actions, How Commenced.* Criminal actions are commenced in the circuit court by the filing of an information founded upon a preliminary examinaton, or by the filing of a complaint in cases not requiring the intervention of a grand jury or a preliminary examination."

Section 3573, S. D. R. C. 1919, defines a felony:

"A felony is a crime which is, or may be, punishable by death or by imprisonment in the state penitentiary."

Statutes Relating to Procedure:

Sect. 4715. "*Forms of Pleading.* All technical forms of pleading in criminal actions having been abolished, it is necessary to plead only the commission of the offense by its usually designated name in plain, ordinary language."

Sec. 4725. "*When Sufficient.* The indictment or information is sufficient if it can be understood therefrom:

"1. That it is entitled in a court having authority to receive it, though the name of the court be not stated.

"2. That the indictment was found by a grand jury of the county in which the court was held.

"3. That the defendant is named, or, if his name is unknown, that he is described by a fictitious name

with the statement that his true name is to the grand jury or state's attorney unknown.

"4. That the offense charged was committed within the jurisdiction of the court, or though without the jurisdiction of the court, is triable therein.

"5. That the offense was committed prior to the time of filing the indictment or information.

"6. That the offense charged is designated in such a manner as to enable a person of common understanding to know what is intended."

Sec. 4726. *Certain Informalities Disregarded.* No indictment or information is insufficient, nor can the trial, judgment or other proceedings thereon be affected, by reason of a defect or imperfection in matter of form, which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

Sec. 4771. *"When Defendant May Demur.* The defendant may demur to the indictment or information when it appears upon the face thereof:

"1. That the grand jury presenting the indictment had no legal authority to inquire into the offense charged by reason of its not being within the legal jurisdiction of the county or *that the court is without jurisdiction of the offense charged.*

"2. That it does not substantially conform to the requirements of this title.

"3. That more than one offense is charged.

"4. That the indictment or information contains matter which, if true, would constitute a legal justification or excuse of the offense charged, or other bar to the prosecution."

Sec. 4772. *Requisites of Demurrer.* The demurrer must be in writing, signed either by the defendant or his counsel, and filed. It must distinctly specify the grounds of the objection to the indictment or information or it must be disregarded.

Sec. 4775. *"Effect of Demurrer if Sustained.* If the demurrer be sustained, the judgment is final and is a bar to another prosecution for the same offense, except that where the court is of the opinion that the objection on which the demurrer is sustained may be avoided in a new indictment or information, he shall direct the case to be resubmitted to the same or another grand jury, or a new information to be filed, as provided in Section 4766."

Section 4777. *"Proceedings if Resubmitted.* If the court directs that the case be submitted anew, or that a new information be filed, the same proceedings must be had thereon as are prescribed in Section 4767."

Sec. 4766. *"When Defendant Discharged.* If the motion be granted the court must order that the defendant, if in custody, be discharged therefrom, or if admitted to bail, that his bail be exonerated, or if he has deposited money instead of bail, that the money be refunded to him, unless it directs that the case be resubmitted to the same or another grand jury or that a new information be filed within such time during the term as the court may specify."

Sec. 4767. *"Resubmission of Case.* If the court directs that the case be resubmitted or that a new information be filed, the defendant, if already in custody, must so remain unless he be admitted to bail; or if already admitted to bail or money has been deposited instead thereof, the bail or money is answerable for the appearance of the defendant to answer a new indictment or information and unless a new indictment be filed during the same or the next term or a new information be filed within the time specified the court must make the order prescribed in the preceding section."

Sec. 4779. *"Objections, How Taken.* When the objections mentioned in section 4771 appear on the face of the indictment or information, they can only be taken by demurrer, except that the objection to

the jurisdiction of the court over the subject of the indictment or information or that it does not describe a public offense, may be taken at the trial under the plea of 'not guilty' and in arrest of judgment."

Sec. 4941. "*Motion in Arrest of Judgment.* A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea or verdict of guilty, or on a verdict against the defendant on a plea of a former conviction or acquittal. It may be founded on any of the defects in the indictment or information mentioned in section 4771, unless the objection has been waived by a failure to demur, and must be made before or at the time defendant is called for judgment."

Sec. 4942. "*Court May Arrest on Its Own Motion—No Bar.* The court may also, on its own view of any of these defects, arrest the judgment without motion. The effect of allowing a motion in arrest of judgment is to place the defendant in the same situation in which he was before the indictment or information was filed, and in no case of arrest of judgment is the verdict a bar to another prosecution."

Sec. 4943. "*Defendant Guilty but Pleading Insufficient.* If from the evidence on the trial there is reasonable ground to believe the defendant guilty, and a new indictment or information can be framed upon which he may be convicted, the court may order him to be recommitted to the officer of the proper county or admitted to bail anew to answer the new indictment or information. If the evidence shows him guilty of another offense, he must be committed or held thereon, but if no evidence appears sufficient to charge him with any offense, he must, if in custody, be discharged, or if admitted to bail, his bail must be exonerated, or if money has been deposited instead of bail, it must be refunded to the defendant, and in such case an arrest of judgment operates as an acquittal of the charge upon which the indictment or information was founded."

Section 4813, Revised Code of South Dakota.

Section 4813. *"Change of Judge and Place of Trial.* A criminal action prosecuted by indictment or information may, at any time before the trial is begun, on the application of the defendant, be removed from the county in which it is pending, whether the offense charged be a felony or misdemeanor, whenever it shall appear to the satisfaction of the court, by affidavits or other evidence, that a fair and impartial trial cannot be had in such county; in which case the court may order the defendant to be tried in some near or adjoining county, in any circuit where a fair and impartial trial can be had; but the defendant shall be entitled to a removal of the action but once, and no more; and if he shall make affidavit that he cannot have an impartial trial by reason of the bias or prejudice of the presiding judge of the circuit court where the indictment or information is pending, the Judge of such court must call some other judge of the circuit court to preside at said trial. And it shall be the duty of such other judge to preside at said trial and do any other act with reference thereto as though he were presiding judge of said circuit court."

Section 6, Art. 6, Constitution of South Dakota.

"The right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controvery, but the legislature may provide for a jury of less than twelve in any court, not a court of record and for the decision of civil cases by three-fourths of the jury in any court."

Section 7, Art. 7, Constitution of South Dakota.

"In all crimial prosecutions the accused shall have the right to defend in person and by counsel; to demand the nature and cause of the accusation against him; to have a copy thereof; to meet the witnesses against him face to face; to have compulsory process served for obtaining witnesses in his behalf, and to a speedy public trial by an impartial

jury of the county or district in which the offense is alleged to have been committed."

Sec. 4410, Revised Code of South Dakota.

Sec. 4410. *"In a criminal action* the defendant is entitled:

1. To defend in person and by counsel;

2. To demand the nature and cause of the accusation against him and to have a copy thereof;

3. To meet the witnesses against him face to face;

4. To have compulsory process served for obtaining witnesses on his behalf; and,

5. To a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, or the county to which such county is attached for judicial purposes."

AFFIDAVIT FILED IN SUPPORT OF MOTIONS TO SUBSTITUTE AND TO INTERVENE

STATE OF SOUTH DAKOTA, }
County of Hughes. } SS.

Byron S. Payne, being first duly sworn, upon his oath states that he is an attorney-at-law residing at Pierre, South Dakota, and duly admitted to practice in the Courts of the State of South Dakota, and in the United States District Court for the District of South Dakota, and in the Supreme Court of the United States. That he is one of the attorneys of record for the appellant in this case.

That this case is a proceeding in habeas corpus brought by the appellant, George W. Egan, against the appellant, Vincent L. Knewell, in his official capacity as Sheriff of Minnehaha County, South Dakota. That the appellant, George W. Egan, was on or about April 17, 1922 convicted in the Circuit Court in and for Minnehaha County, South Dakota, of a criminal offense, and was by the judgment of said

Court on or about said date sentenced to imprisonment in the penitentiary of the State of South Dakota for a period of two years. That said Circuit Court of said County is one of the Courts of general jurisdiction of said state. That on or about December 1, 1923, process from said Court was placed in the hands of the appellant in his capacity as Sheriff of said Minnehaha County, for the execution of said judgment, and for the placing of the said appellee, Egan, in the said South Dakota Penitentiary. That on or about said date said appellant, Knewell, took the appellee, Egan, into his custody by virtue of said process of said Court to execute said judgment. That thereupon the appellee, Egan, filed his petition for a writ of habeas corpus with the District Court of the United States for the District of South Dakota. That upon the hearing upon the said writ, the appellant, Knewell, appeared by Hugh Gamble, who was then an attorney-at-law and the regularly elected, qualified and acting States Attorney in and for Minnehaha County, South Dakota. That at the hearing on said writ, the Hon. Buell F. Jones, Attorney General of the State of South Dakota, also appeared in his official capacity as such officer in opposition to the discharge of the appellee under said writ and appears of record as one of the attorneys for the appellant, Knewell, in the District Court. That affiant also appeared in said proceeding in opposition to the granting of the discharge of the appellee, Egan, from the custody of the said Sheriff, being employed by the Attorney General in behalf of the State of South Dakota, and representing the State of South Dakota in such proceeding. That the entire expense in said proceeding of defending the appellant, Knewell, and the custody which Knewell had of the said Egan was paid by the State of South Dakota.

The above described District Court having on or about April 2, 1924 entered its Order and Decision to the effect that the petitioner, Egan, be discharged from the custody of the said Knewell, as Sheriff of

Minnehaha County, South Dakota, an appeal was taken in the name of said Knewell to the Supreme Court of the United States. That said appeal was taken by Buell F. Jones, Attorney General of South Dakota, by Hugh Gamble as States Attorney of Minnehaha County, South Dakota, and by affiant employed by and representing the State of South Dakota, all acting as counsel in said matter. That the State of South Dakota has paid the entire expense of prosecuting this appeal, and all costs thereof, including the cost of printing the record and for Clerk's fees. That the said appellant, Vincent L. Knewell, at no time has been represented by his own personal or private counsel nor has he paid any of the expenses of such appeal. That affiant has caused his appearance to be entered of record in said cause for said appellant, but same was entered in behalf of the State of South Dakota, at the request and under the employment of the Attorny General of said State, and for the purpose of protecting the interests of the State of South Dakota, in said proceeding. That Section 5364 of the South Dakota Revised Code of 1919 provides among other things that the Attorney General "whenever in his judgment the welfare of the state demands, shall appear for the State and prosecute or defend, in any Court or before any officer, any cause or matter, civil or criminal, in which the State may be a party or interested." That the Attorney General of South Dakota has deemed that the welfare of the State of South Dakota demands that he appear in the instant case, and the Attorney General did appear in this cause, while pending before the United States District Court. That the Attorney General has not personally entered his appearance in the United States Supreme Court because of the fact that he has not yet been admitted to practice in said Court, but he authorized affiant in behalf of the State of South Dakota and representing the Attorney General to enter said appearance of record in behalf of the appellant, and to protect and defend the rights and

interests of the State of South Dakota in said appeal.

That said Vincent L. Knewell is no longer Sheriff of Minnehaha County, South Dakota, his term of office having expired on January 6th, 1925. That he was then succeeded by George Boardman as Sheriff of Minnehaha County, South Dakota, who on said date, having been duly elected to said office, qualified and assumed the duties of said office. That on January 6, 1925, when the said Knewell was succeeded by the said Boardman, the process for the execution of the judgment rendered against the said Egan hereinbefore described was in the hands of the said Knewell, the said judgment never having been executed because of the Order of the United States District Court above described for the discharge of the said Egan. That Section 7038 of the South Dakota Revised Code, 1919, provides as follows:

"Every public officer elected or appointed under the laws of this state, on going out of office at the expiration of his term thereof, shall forthwith deliver to his successor in office all public money, books, records, accounts, papers, documents and property in his possession or under his control belonging or appertaining to such office."

That the process by which the said Knewell was holding the said Egan in custody at the time the writ of habeas was issued out of the said United States District Court has now been delivered to the said George Boardman as successor in office to the said Knewell, and it is now the duty of the said Boardman to execute said judgment except as restrained by the judgment of the United States District Court discharging the said Egan as above set forth.

That Samuel Herrick, attorney-at-law, of Washington, D. C., is authorized by the Attorney General of South Dakota to represent the State of South Dakota in this matter, the said appellant, Knewell, and his successor in office, the said George Boardman,

and to enter his appearance of record in behalf of each and every one of the above.

This affidavit and verified statement is made in behalf of the State of South Dakota to show its interest therein and in behalf of the said George Boardman for whom there is pending a motion to be substituted as a party to this cause, and to apprise the Court fully in the situation, with respect to said cause.

BYRON S. PAYNE

Subscribed and sworn to before me
this 16th day of January, 1925.

Otto B. Linstad,
Notary Public, S. D.

(Seal)

My Commission expires July 31st, 1928.